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NO. 91-1067
IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

RICHARD SHROY, et al.,

Petitioners

v.

EVELYN SHOOP,

Respondent

BRIEF OF RESPONDENT

MORGAN, HALLGREN, CROSSWELL & KANE, P.C.
A Professional Corporation

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether Respondent's constitutional right to be free from an illegal arrest is clearly established and the contours of the right are sufficiently clear that a reasonable deputy sheriff would understand that an arrest without probable cause violates that right?

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COUNTERSTATEMENT OF THE CASE

During the primary election on May 19, 1987, the parents of Judith A. Vallier, Judge of Elections in Jackson Township, Dauphin County, Pennsylvania, came to the Jackson Township polling place to vote. Evelyn Shoop, an Official Poll Watcher authorized to be at the polling place, challenged their right to vote because they had moved to Halifax Township, a different voting district. Vallier, however, permitted her mother to vote without requiring her to sign a Challenge Affidavit. Moreover, sometime thereafter, Vallier signed a Challenge Affidavit which purportedly gave her father the right to vote in Jackson Township. The Challenge Affidavit, however, was left blank as to her father's residency.

Disturbed by this abuse of the electoral process, Evelyn Shoop and the Director of the Voter Registration Bureau met with Richard Lewis, District Attorney of and for Dauphin County. Evelyn Shoop explained to Mr. Lewis that she wished to know what she, as an Official Poll Watcher, should lawfully do to prevent unauthorized voters from voting at her polling place on election day. Mr. Lewis provided no assistance.

On general election day, November 3, 1987, Evelyn Shoop again was an Official Poll Watcher for Jackson Township. Brenda Webster was present at the polling place and was acting in the official capacity of Court Appointed Overseer, having been appointed as such due to the voting irregularities noted above. Also present at the polling place was Suzette Shoop, daughter of Evelyn Shoop, who was an Official Poll Watcher present at the polling place pursuant to a poll watcher's certificate. On that day, Vallier's parents, who desired to vote in Jackson Township, showed up at the polling place. Evelyn Shoop again challenged their right to vote, alleging that they were not residents of Jackson Township. In order to overcome this challenge, Vallier's parents needed only to complete a Challenge Affidavit. This is a simple form which is readily available and conveniently located at the polling place. Mr. Grant Greider, Vallier's father, who had previously held the position of Judge of Elections, testified that he was familiar with the challenge affidavit procedure. In fact, he had used this procedure in order to vote in the May primary election. However, he did not complete the challenge affidavit properly because he did not indicate his address.

Nonetheless, his daughter and current Judge of Elections, Judith Vallier, allowed him to vote in the primary.

Rather than follow the challenge affidavit procedure in November, 1987, Mr. Greider chose to drive to the Dauphin County Courthouse and meet with Judge Dowling, the judge on duty for election matters. Additionally, Mr. Greider chose to inform Judge Dowling that he had a "temporary" residence outside of Jackson Township. However, Mr. Greider had been living at this temporary residence for approximately three and one-half years.

In the omnibus pretrial hearing addressing the criminal charges brought against Evelyn Shoop, Judge Natale found that Mr. Greider's testimony made it abundantly clear that Mr. Greider was a resident of Halifax Township and had no right to vote in Jackson Township: he slept in Halifax Township save for a dozen times; he paid income taxes from the Halifax address; his driver's license listed the Halifax address and he was served with his subpoena in Halifax Township. Moreover, Judge Natale found that Mr. Greider was the Judge of Elections in Jackson Township for eight years

before his daughter took over and he certainly should have known the provisions of the Election Code.

The Greiders were given permission by Judge Dowling to vote, after representing to Judge Dowling that they resided in Jackson Township. It was further represented to the Judge that Evelyn Shoop was causing a disturbance, that she was using foul and obscene language and racial epithets. The Judge told the Sheriff's Office to investigate and determine if Evelyn Shoop was interfering with people voting. Contrary to Petitioners' allegation that Judge Dowling instructed the Sheriff's Office to remove Evelyn Shoop from the polling place, Judge Dowling stated unequivocally in the criminal hearing: "Oh no, I didn't order anybody to be removed". Judge Dowling further stated that he accepted as accurate the testimony which established that he, Judge Dowling, told Chief Deputy Sheriff Henderson merely to "send a car up there and see what's going on, period". When Evelyn Shoop's counsel in the criminal hearing stated that all the testimony revealed that Deputy Fisher grabbed Mrs. Shoop before she was disorderly, Judge Dowling testified "I certainly didn't tell him to do that, obviously".

Another witness who absolutely corroborates the testimony of Judge Dowling is Chief Deputy Henderson. Henderson's testimony in the criminal hearing is particularly telling because the order had been given by Judge Dowling to Henderson, not to Deputy Fisher. Chief Deputy Henderson testified that on November 3, 1987, he was called to Judge Dowling's chambers. Judge Dowling instructed Mr. Henderson to look into the matter. Henderson testified that he "was to dispatch a car to Jackson Township to check out the complaint" and that no other statement was made by Judge Dowling on that occasion. According to Henderson he then "dispatched Deputy Fisher and Court Deputy Shroy in car 123" and "told them to go up there and see what the complaint was and immediately call me back". According to Henderson, Fisher knew that the entire order from Judge Dowling was to "check out the situation" and that the instruction to check out the situation "was the whole order".

Accordingly, deputy sheriffs Fisher and Shroy were dispatched to the polling place to check out the complaint of Evelyn Shoop's behavior. Deputy Hallman, another deputy sheriff, had been posted at the polling place from the time it opened. Deputy

information. There was no exigency which prevented him from so doing.

In Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985), cert. dismissed 478 U.S. 1044 (1986), the court stated that "probable cause" means more than bare suspicion but less than a virtual certainty for believing that a seizure will be fruitful. Id at 1565. Even the fact that a murderer is on the loose does not give the police a license to search and seize without a reasonable basis, though it may affect the judgment of what is reasonable. Id. "Probable cause" describes not a point but a zone, within which the graver the crime the more latitude the police must be allowed. Murder is generally as grave a crisis as a local police department will encounter. The police must be allowed more leeway in resolving it than when they are investigating the theft of a bicycle. Id. at 1565-66. The amount of information that prudent police will collect before deciding to make an arrest, and hence the amount of probable cause they will have, is a function of the gravity of the crime. It is not reasonable for police to act on limited information if they could

have gotten better information first without incurring, or subjecting others to, great danger. Id.

In the instant situation, the courts below determined that the facts which are established without contradiction do not establish probable cause or reasonable belief in probable cause on the part of the deputies sufficient to award qualified immunity for the arrest of Evelyn Shoop. The District Court found that, even according to Petitioners' version of the facts, the deputies were sent to the polls to ascertain whether there was a disturbance, not strictly to remove Evelyn Shoop. The District Court further stated:

> In ascertaining the situation at the polls, Shroy and Fisher spoke to only two individuals, a deputy who had not seen fit to intervene himself and Judith Vallier, who had a definite interest and a possible bias in seeing Mrs. Shoop removed. Importantly, there were many other witnesses handy, including Roberta Karper, who has stated that Mrs. Shoop was not disruptive. Deposition of Roberta Karper at 12-23. That the deputies later received orders, supposedly from Judge Dowling, to remove Mrs. Shoop becomes almost irrelevant because any order would be based on Shroy and Fisher's inadequate assessment of the situation at the polls [citations omitted]. Moreover, at the time the deputies arrived at the fire hall, things appeared to be fairly calm, and thus they had no real immediate need to escort Mrs. Shoop from the polls.

Hallman was surprised to see Fisher and Shroy when they arrived. In fact, Fisher testified in the criminal hearing that Hallman "was dumbfounded to see us up there" and "said we weren't needed". Hallman was present at the polling place all morning and had not seen fit to intervene in the activities taking place, let alone to make an arrest.

Fisher further noted that Evelyn Shoop was seated at a table when they entered the polling place. Fisher did not see Evelyn Shoop causing any disturbance when they arrived. Deputy Shroy testified that when they arrived Deputy Hallman told them everything was orderly. Shroy made this observation himself, noting that there was "peace" at the polling place when he arrived. Deputy Hallman had taken no action against Evelyn Shoop and did not call his office requesting anyone else be sent to the polling place.

Mrs. Roberta Karper was a witness to the events which took place at the Jackson Township polls on November 3, 1987. In her deposition, Mrs. Karper testified that she arrived at the polling place when it opened, shortly after 7:00 a.m. Mrs. Karper was a watcher who was sitting at the same table with Mrs. Shoop. She stated that

she heard Mrs. Shoop "say hello to the people and how are you". Furthermore, Mrs. Karper testified that Mrs. Shoop did not make caustic or abrasive comments during the morning of November 3, 1987. She testified extensively to this effect.

Deputies Shroy and Fisher spoke briefly to Judith Vallier upon arriving at the polling place. Contrary to Petitioners' assertions, the testimony of Judith Vallier demonstrates that Deputy Fisher did not seek information from her in order to determine what his course of action should be. Fisher approached Vallier and stated that he had been ordered by the judge to remove Evelyn Shoop. Vallier stated:

> They came with the court order. They came and said, we have a court order to have this woman removed. I pointed her out. They said they were going to call the courthouse and have verification, and they did this. They called down to the courthouse and then they came back and they said, we were given the okay to remove this woman.

According to Vallier, the deputies initiated the conversation by stating "we are here on judge's orders" and "we'd like to remove Evelyn Shoop". Mrs. Vallier testified that she failed to tell the deputies that Mrs. Shoop had been allegedly shouting all morning and calling people names. Mrs. Vallier stated that "I didn't have a

very long conversation with them [Fisher and Shroy]". Mrs. Vallier admitted that neither Fisher nor Shroy could have known about alleged previous shouting by Mrs. Shoop since she testified that it was "perfectly orderly" at the polling place when the deputies arrived and that Mrs. Shoop was seated quietly behind the watcher's table with a watcher's certificate in her possession.

Deputy Fisher then approached Evelyn Shoop and told her she was to leave by court order. Deputy Fisher told Evelyn Shoop she was under arrest and grabbed her arm. For the next several hours, the peace of the polling place was disturbed. Eventually, State Trooper McAllister arrived at the polling place. After speaking with the deputies, McAllister, Shroy and Fisher subdued Evelyn Shoop, beat her and used unnecessary and excessive force and physically carried her out of the polling place.

Each of the named Plaintiffs, including Respondent Evelyn Shoop, was charged with aggravated assault and resisting arrest as a result of the incidents which took place at the Fisherville Fire Hall on November 3, 1987. After a lengthy hearing, the charges against Respondent Evelyn Shoop were dismissed due to the fact that there

was no court order nor was there probable cause for her arrest. The Honorable Sebastian D. Natale, by Order dated July 25, 1988, dismissed all charges against Respondent Evelyn Shoop. Furthermore, the criminal charges lodged against Plaintiffs Brenda Webster and Suzette Shoop were dismissed after hearings before a district justice. There was no probable cause for the arrests, and this fact was established by the Pennsylvania judiciary.

Judge Natale's Opinion stated, in part, that there was "no probable cause to attempt to arrest Defendant [Evelyn Shoop]". Judge Natale's Opinion further states:

> At the time that the [Deputy Fisher] approached Defendant to "arrest" her, the only crime which Deputy Fisher could possibly guess that she had committed was contempt of a court order to remove her. The Judge who allegedly gave this order testified that he did not give such an order. (N.T. at 509). The deputy himself testified to numerous and directly conflicting versions of this order and maintained that he, by virtue of working for the Sheriff, had the power to order someone from one room to another if they did not go. (N.T. at 165-167). This is obviously not the law of this Commonwealth nor of this country.

Defendant William H. Livingston, Sheriff of Dauphin County, testified that there is no training for the deputies on how to

use force or when to use force. He further testified that there is no written procedure of any type of the training of deputies. In fact, Sheriff Livingston testified that there are no policies or procedures with respect to training deputies. Sheriff Livingston testified that there is no method to monitor the deputies' performance. He also indicated that there is no procedure for determining whether a deputy should be reprimanded.

SUMMARY OF ARGUMENT

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known. A constitutional right is "clearly established" when the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right.

On summary judgment, the judge appropriately may determine whether the law was clearly established at the time the action occurred. However, questions of fact would preclude resolution of

the immunity issue. A defendant is entitled to summary judgment only if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant committed the acts alleged by plaintiff. In the instant action, the courts below determined that the law regarding arrest without probable cause was clearly established at the time the arrest occurred, and further determined that sufficient evidence exists to create a genuine issue of fact with regard to the legality of Respondent's arrest. The instant case is not appropriate for resolution on summary judgment.

ARGUMENT

I. RELATIONSHIP BETWEEN QUALIFIED IMMUNITY, INTERLOCUTORY APPEALS AND MOTIONS FOR SUMMARY JUDGMENT.

In Mitchell v. Forsyth, 472 U.S. 511 (1985), the Supreme Court ruled that the denial of a defendant's pretrial claim to qualified immunity may be appealed on an interlocutory basis. The Court reasoned that immunity was itself a defense to suit and that the benefits of immunity to prevent the trial of insubstantial claims would be lost if immediate appeals were not allowed. Id at 526. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court ruled that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory rights of which a reasonable person would have known. In Anderson v. Creighton, 483 U.S. 635 (1987), the Court stated that a constitutional right is "clearly established" when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." Id at 640. "On summary judgment, the judge appropriately may determine . . . whether the law was clearly

established at the time the action occurred." Harlow, 457 U.S. at 818-19.

However, even under Harlow, questions of fact would preclude appellate resolution of the immunity issue. In Mitchell, the Court stated that a defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant committed those acts (emphasis supplied). 427 U.S. at 526. In the instant matter, the courts below determined that the law regarding arrest without probable cause was clearly established at the time the arrest occurred, and further determined that sufficient evidence exists to create a genuine issue of fact with regard to the legality of Respondent's arrest. The courts found that the instant case is not appropriate for resolution on summary judgment.

II. THE COURTS BELOW WERE CORRECT IN REJECTING PETITIONERS' CLAIM OF QUALIFIED IMMUNITY BECAUSE RESPONDENT'S CONSTITUTIONAL RIGHT TO BE FREE FROM ILLEGAL ARREST IS CLEARLY ESTABLISHED AND THE CONTOURS OF THE RIGHT ARE SUFFICIENTLY CLEAR SUCH THAT A REASONABLE OFFICER WOULD UNDERSTAND THAT AN ARREST WITHOUT PROBABLE CAUSE VIOLATES THAT RIGHT.

By Order and Memorandum dated January 22, 1991, the District Court denied Petitioners' motion for partial summary judgment with regard to the arrest of Evelyn Shoop and Suzette Shoop. The District Court granted Petitioners' motion for partial summary judgment with regard to the arrest of Brenda Webster. By Order dated September 6, 1991, the United States Court of Appeals for the Third Circuit upheld the decision of the District Court. The Courts below thus found that Petitioners Shroy and Fisher are not entitled to qualified immunity with regard to their arrest of Respondent Evelyn Shoop without probable cause and without a warrant.

It is noted that public officials performing discretionary functions have been granted qualified immunity from civil liability "insofar as their conduct does not violate clearly established statutory

or constitutional rights which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The question is not whether Petitioners had probable cause to arrest Respondent, but whether their belief that they had probable cause was objectively reasonable in light of the circumstances at the time of the arrest and that their conduct did not violate any "clearly established" laws. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

The "clearly established" standard set forth in Anderson requires a fact-specific assessment of the clarity of the constitutional right asserted. A defendant's claim to qualified immunity cannot be defeated by an allegation that the constitutional protection allegedly violated was, in some general sense, violated. Anderson, 435 U.S. 635. In the instant action, however, Petitioners would have the Court apply this "fact-specific assessment" and "clearly established" standard to require statutory or case law involving voting disputes, challenges and arrests without probable cause. Petitioners state that "[e]xhaustive research has failed to uncover an appellate decision discussing the unlawfulness of an arrest under circumstances even

remotely similar to those presented here." This is clearly not the requirement of Anderson. Such an interpretation would require an appellate decision discussing each and every fact pattern conceivable during an arrest; in the event such a decision did not exist, qualified immunity under the Petitioners' reasoning would be applicable.

In Anderson, the Court specifically stated that:

> The contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . . 483 U.S. at 640.

The lower courts do not require further guidance concerning the requirements established in Anderson, and have logically applied and followed the Court's rationale and policy behind Anderson. For example, in Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988), a case involving an arrest without probable cause, the court applied the "fact-specific assessment" and "clearly established" standards set forth in Anderson. The court stated that under the general Harlow test for qualified immunity:

> [T]he test of qualified immunity . . . is one of 'objective legal reasonableness' - whether an official acting under the circumstances at issue reasonably could have believed that his

> action did not violate the constitutional rights asserted. Id at 956.

The court stated that at the more specific Anderson level:

> [In a] warrantless arrest by a police officer - the test is whether a police officer acting under the circumstances at issue reasonably could have believed that he had reasonable cause to arrest, i.e., to believe the arrestee was committing or had committed a criminal offense. Id.

The court further stated that although objective inquiry into the reasonableness of an officer's perception of the critical facts leading to an arrest must obviously not take into account facts not available to him at the time, it must, however, charge him with possession of all the information reasonably discoverable by an officer acting reasonably under the circumstances. "[A] police officer may not close his eyes to facts that would help clarify the circumstances of an arrest." Id at 957, n. 5 (citations omitted).

The court held that because of the defendant police officer's impatience and irritation with the plaintiff, he simply did not bother to do what any police officer acting reasonably in the circumstances would have done to clarify the factual situation. He did not perform a thorough investigation and did not avail himself of readily available

Judge Natale, in the criminal proceeding against Mrs. Shoop, held that, accepting as true the Commonwealth's own evidence, there was no probable cause to arrest Evelyn Shoop.

> At the time he approached defendant to "arrest" her, the only crime which Deputy Fisher could possibly guess that she had committed was contempt of a court order to remove her. The Judge who allegedly gave this order testified that he did not give such an order. The deputy himself testified to numerous and directly conflicting versions of this order and maintained that he, by virtue of working for the Sheriff, had the power to order someone from one room to another and arrest them if they did not go. This is obviously not the law of this Commonwealth nor of this Country.
>
> As there was no court order for the defendant's removal, the deputy's actions would have to rely on probable cause for a warrantless arrest. But, there was no cause at all to believe defendant has engaged in any criminal activity prior to the deputy grabbing and arresting her. The record is replete with witnesses' testimony to the effect that no one had told the deputies that Mrs. Shoop had done anything criminal. The deputy admits he personally observed no wrong doing. Judy Vallier testified that the deputies told her that they wanted to remove Mrs. Shoop when they first walked into the polling place.

The testimony of Fisher and Shroy demonstrated that there was no disturbance at the polling place on their arrival. Mrs. Vallier testified that although there was a law enforcement officer present at the poiling place throughout the day, she did not ask him to take any action. Moreover, Deputies Shroy and Fisher spoke only briefly to

Judith Vallier upon arriving at the polling place. Contrary to Petitioners' assertions, the testimony of Judith Vallier demonstrates that Deputy Fisher did not seek information from her in order to determine what his course of action should be. Fisher approached Vallier and stated that he had been ordered by the judge to remove Evelyn Shoop. Vallier stated:

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Shoop was seated quietly behind the watcher's table with a watcher's certificate in her possession.

Deputies Fisher and Shroy must be charged with possession of all the information reasonably discoverable by officers acting reasonably under the circumstances. A deputy may not close his eyes to facts that would help clarify the circumstances of an arrest. Shroy and Fisher did not perform a thorough investigation and did not avail themselves of readily available information. Their conversation with Judith Vallier was not for the purpose of eliciting information with regard to Evelyn Shoop's actions at the polling place. The deputies told Vallier that they would like to remove Evelyn Shoop. Moreover, they did not speak with other eyewitnesses at the polling place, such as Roberta Karper, a poll watcher who was seated at the table with Evelyn Shoop. Roberta Karper testified that Mrs. Shoop did not make caustic or abrasive comments during the morning of November 3, 1987. She testified extensively to this effect. There was no exigency which prevented Shroy and Fisher from conducting a proper investigation.

The amount of information that prudent police will collect before deciding to make an arrest, and hence the amount of probable cause they will have, is a function of the gravity of the crime. It is not reasonable for police to act on limited information if they could have gotten better information first without incurring, or subjecting others to, great danger. In the instant matter, at the time the deputy sheriffs attempted to arrest Evelyn Shoop, the very most the deputy sheriffs could assume transpired at the polling place was that Evelyn Shoop had made caustic and abrasive comments. It is respectfully submitted that this is a far cry from murder. It was not reasonable for the deputies to act on such limited information when they easily could have obtained additional or better information. This resulted in subjecting Respondent to great danger and personal injury.

III. SUMMARY JUDGMENT IS INAPPROPRIATE

In Losch v. Borough of Parkesburg, PA., 736 F.2d 903 (3rd Cir. 1984), the defendant police officer argued that he was entitled to qualified immunity because he had probable cause to institute criminal charges against the plaintiff. The Court stated:

> The question before us is whether the grant of summary judgment on this issue was appropriate. Resolving all doubts in [plaintiff's] favor, we must decide whether, on the probable cause issue, there was before the district court "no genuine issue as to any material fact." Any credible evidence contrary to the moving party's version of the events will defeat the summary judgment motion. We must evaluate for some minimal showing of credibility any evidence that the defendants did not have probable cause to charge plaintiff under the two Pennsylvania statutes. Id at 908.

The courts below found that Respondent has presented credible evidence contrary to Petitioners' version of the events which transpired at the polling place. The courts below determined that the law regarding arrest without probable cause was clearly established at the time the arrest occurred, and further determined that sufficient evidence exists to create a genuine issue of fact with regard to the legality of Respondent's arrest.

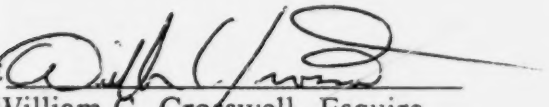
CONCLUSION

If an officer acts upon information which is insufficient to meet the probable cause standard, it is untenable to claim that the officer is entitled to immunity on a theory that the law had not been clearly established that his particular conduct was illegal. If an officer did not have a sufficient basis to make a practical, common

sense decision that a fair probability of a crime or evidence of a crime existed, he cannot have acted in an objectively reasonable manner.

For all the reasons set forth above, Respondent respectfully requests that the Court deny the instant Petition for Writ of Certiorari.

MORGAN, HALLGREN,
CROSSWELL & KANE, P.C.

By: 

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